SMU | Dedman School of Law

SMU Law Review

Volume 34
Issue 1 *Annual Survey of Texas Law*

Article 15

1980

Local Government Law

Charles L. Babcock

PART III: PUBLIC LAW

LOCAL GOVERNMENT LAW

by

*Charles L. Babcock**

I. OPEN MEETINGS AND RECORDS

A. *Open Meetings Act and Access to Government Facilities*

Standing of the Press. For a short time during the survey period the right of the press to challenge violations of the Texas Open Meetings Act[1] was in question. In *City of Abilene v. Shackelford*[2] the Eastland court of civil appeals held that a reporter, newspaper, and television station had no standing to sue under the Open Meetings Act and the Abilene City Charter.[3]

The Texas Supreme Court held that the reporter, Shackelford, had standing to contest violations of the city charter, thus reversing this aspect of the Eastland court's ruling. The supreme court did not specifically address whether the corporate plaintiffs, the television station and newspaper, had standing under the city charter. The opinion repeatedly refers to Shackelford as a citizen of Abilene with rights under the charter, but it does not exclude the corporate plaintiffs from the holding. As the court affirmed the judgment of the trial court, which upheld the standing of all plaintiffs, the assumption arises that the corporate plaintiffs also had standing to contest violations of the city charter.

The legislature overturned the Open Meetings Act aspect of *Shackelford* by amending the Act to provide that "any interested person, *including bona fide members of the news media*, may commence an action" to stop or prevent violations of the Act.[4] This amendment calls into question the status of the press because only "*bona fide* members of the news media" are given standing. Does "bona fide" include representatives of the underground press?[5] Does the lonely pamphleteer protected by the first amendment to the United States Constitution have rights as a bona fide member of the

---

* A.B., Brown University; J.D., Boston University School of Law. Attorney at Law, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Texas.

1. TEX. REV. CIV. STAT. ANN. art. 6252—17 (Vernon 1970).

2. 572 S.W.2d 742 (Tex. Civ. App.—Eastland 1978), *rev'd*, 585 S.W.2d 665 (Tex. 1979).

3. Section 122 of the charter requires that "[a]ll meetings of the Council and all Boards or Commissions appointed by the Council shall be open to the public." 572 S.W.2d at 744.

4. TEX. REV. CIV. STAT. ANN. art. 6252—17, § 3 (Vernon Supp. 1980) (emphasis added).

5. *See* Comment, *Has Branzburg Buried the Underground Press*, 8 HARV. C.R.-C.L. L. REV. 181 (1973).

media? Some first amendment observers have opposed state legislation giving the media special rights for fear that the problems inherent in defining the "press" will ultimately lead to state licensing of reporters.[6]

Although overshadowed by the controversy in *Shackleford*, the Beaumont court of appeals rendered a scholarly opinion in *Enterprise Co. v. City of Beaumont*.[7] The *Enterprise* case involved whether a newspaper publisher had the right to attend collective bargaining sessions between the city of Beaumont and a local voluntary association of firefighters. The Employee Relations Act requires that such meetings be open to the public.[8] Again, the standing of the press to enforce this statute was challenged. The Beaumont court held, however, that the newspaper publisher did have standing. It followed the approach taken by the Houston (14th District) court of appeals in *Houston Chronicle Publishing Co. v. City of Houston*,[9] which built upon a line of United States Supreme Court cases holding that the press's right of access to governmental functions is coextensive with the rights of the public.[10] As the public was expressly granted the right of access by the Employee Relations Act, the Beaumont court held that the publisher had the same right. Having found that the publisher could challenge a violation of the Employee Relations Act, the court issued an injunction prohibiting the plaintiff from being excluded from any meeting of the defendants "wherein deliberations are to be conducted pertaining to collective bargining [*sic*] between them . . . *or* any joint meetings held by the parties."[11] It went on to hold that separate meetings between the collective bargainer and the parties were exempt from the public meeting requirement.

Access to Government Officials and Facilities. One of the more unusual cases decided during the survey period, *Southwestern Newspapers Corp. v. Curtis*,[12] involved Potter County district attorney Tom Curtis. Three Amarillo newspapers alleged that Curtis became piqued over adverse publicity in the three papers and retaliated by imposing restrictions upon reporters' access to the district attorney's office. These restrictions were imposed only upon the three newspapers and not upon other members of the press. The trial court found that the plaintiffs had met all of the requirements for a preliminary injunction save a showing of irreparable injury. The Amarillo court of appeals reversed, predictably holding that if

6. *See Symposium on the Press Clause*, 7 HOFSTRA L. REV. 559 (1979). *See also* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

7. 574 S.W.2d 786 (Tex. Civ. App.—Beaumont 1978, no writ).

8. TEX. REV. CIV. STAT. ANN. art. 5154c, § 7(e) (Vernon Pam. Supp. 1971-1979).

9. 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

10. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (press right of access not superior to general public); Pell v. Procunier, 417 U.S. 817 (1974) (state regulation barring interviews between newsmen and prison inmates upheld); Saxbe v. Washington Post, 417 U.S. 843 (1974) (Bureau of Prisons policy statement barring inmate news interviews upheld).

11. 574 S.W.2d at 791-92.

12. 584 S.W.2d 362 (Tex. Civ. App.—Amarillo 1979, no writ). *See also* Curtis v. Nobles, 588 S.W.2d 687 (Tex. Civ. App.—Amarillo 1979, no writ).

access to some media is granted, that access must be equal and, within reasonable limits, there must be access with equal convenience to official news sources such as a district attorney and his staff.

There is a dictum in the *Curtis* case, however, that is important. The Amarillo court of appeals stated that, absent some compelling governmental interest, access to public officials and their places of work must be granted to the press and, once granted, administered equally. There is some support for this theory, found primarily in *Houston Chronicle Publishing Co. v. City of Houston*.[13] In that case the court found that under the first amendment the public has a constitutional right to certain records even though such records are not available under the state Open Records Act.[14] The court reasoned that, as the public and press have coextensive rights to such information, the media should also be able to obtain the data. The same analysis may be made in giving the public and the press access to government employees and buildings under the first amendment or article one, section eight, of the Texas Constitution. The public's right of access to government under the petition, speech, and press clauses of the first amendment is relatively undeveloped. To the extent the *Curtis* case signals an extension of the *Houston Chronicle* case, it will bear watching.

B. *Open Records Act and Access to Information*

Legislation Affecting Public Disclosure of Information. Three amendments to the Open Records Act were passed by the Sixty-sixth Legislature. One of the amendments, providing for attorneys' fees to successful private litigants in Open Records Act litigation, was vetoed by Governor Clements.[15] The Governor did sign legislation, however, that exempted from the Open Records Act the home addresses and telephone numbers of peace officers.[16]

The Governor also signed legislation that amended section 10 of the Open Records Act to provide that a custodian of public records, or his agent, violates the Act if, "with criminal negligence, he or his agent fails or refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act."[17] The offense is classed as a misdemeanor punishable by a jail term not to exceed six months, or a fine not to exceed $1,000, or both.[18] There are, however, several affirmative defenses to prosecution under section 10. If the custodian, because of his reasonable reliance upon a court order or a written interpretation of the Act by either a court or the attorney general, reasonably believed that the public records were not required to be made avail-

13. *See* note 9 *supra* and accompanying text.
14. TEX. REV. CIV. STAT. ANN. art. 6252—17a (Vernon Supp. 1980).
15. S.B. 1025, 66th Legis. (1979); *see Clements Vetoes Records Bill*, Austin—Am. Statesman, May 19, 1979, at B2, col. 1.
16. TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(17) (Vernon Supp. 1980).
17. *Id.* § 10(b).
18. *Id.* § 10(e).

able, a defense is provided.[19] The custodian may also defend by asserting that a decision from the attorney general was requested pursuant to the Act and is still pending, or that an action was filed seeking relief from compliance with the attorney general's decision.[20] If an agent of the custodian is prosecuted, it is an affirmative defense that he reasonably relied upon written nondisclosure instructions of the custodian of the public records.[21]

The legislature exercised its authority to designate specific records as either public or confidential on several occasions in the past session. Thus, by the addition of section 46.006 to the Human Resources Code, "[a]ll files and records on recipients of benefits provided under [the child support section of the Human Resources Code] and on an alleged father of an illegitimate child are confidential."[22] The legislature also created a new exception for designated hospital records that directly or indirectly identify a patient, former patient, or proposed patient as defined in the Texas Mental Health Code.[23] The amendment allows disclosure of a deceased patient's records if consent is given by the executor or administrator of his estate, the surviving spouse, or, if no spouse survives, a relative within the first degree of consanguinity.[24]

An amendment to article 6252-9b provides that the public should have access to the financial statements of state officers and that the secretary of state must maintain the statements and affidavits as required under the article in a place accessible to the public during regular office hours. Every requester of information is required to file with the secretary of state his name, address, the person whom he represents, and the date of the request.[25]

In amending the State Bar Act,[26] the legislature made all records of the state bar, with two major exceptions, subject to the Open Records Act. The first exception encompasses records relating to grievances, while the second concerns records pertaining to the Texas Board of Legal Specialization.[27] The state bar will be governed by a board of directors whose meetings shall be conducted in compliance with the Open Meetings Act.[28]

Bank Examination Reports. The Texas Supreme Court in *Stewart v. McCain*[29] held that information obtained by the Banking Department relative to the financial condition of state banks is confidential and that an absolute privilege against disclosure is provided by the Texas Banking

19. *Id.* § 10(c)(1).
20. *Id.* §§ 10(c)(2)-(3).
21. *Id.* § 10(d).
22. TEX. HUMAN RESOURCES CODE ANN. § 46.006 (Vernon Pam. Supp. 1979).
23. TEX. REV. CIV. STAT. ANN. art. 5547—87 (Vernon Supp. 1980).
24. *Id.* art. 5547—87(a)(1).
25. *Id.* art. 6252—9b.
26. *Id.* art. 320a—1.
27. *Id.* § 9(f).
28. *Id.* § 9(a).
29. 575 S.W.2d 509 (Tex. 1978).

Code.[30] The information, a bank examiner's interoffice memorandum to the Banking Commission, was sought pursuant to a subpoena duces tecum in a pending civil law suit. The court noted that the examiner's formal report was available to the parties and emphasized the need for confidentiality in the Banking Department's internal communications that are based on the examiner's opinions and impressions.[31] Without prior judicial precedent, the court relied on an opinion of the attorney general and concluded that such information should remain confidential.[32]

Attorney General Opinions. There were twenty formal open record decisions issued by the attorney general during the survey period. The following are the more important decisions.

1. In ORD-208 the attorney general held that the names of complainants who filed formal complaints with the police department's internal affairs division are public information and are required to be disclosed.[33] Furthermore, the name of the officer who is the subject of the complaint and the final disposition of the complaint by the city police department are also public information.[34]

2. In ORD-209 the individual written comments and portions of a consultant's report of an opinion survey of Richardson Independent School District employees were held excepted from disclosure.[35] The attorney general stated that the comments were more in the nature of opinion advice and recommendation than factual information and thus were exempt.[36] The remaining portions of the survey concerning questions asking for an objective response were held to be public.[37]

3. In ORD-210 the attorney general held that a school superintendent is entitled to see documents presented to the school board outlining charges against him.[38] The superintendent, however, was held not to have the right to examine correspondence between the board and its attorneys concerning the matter.[39]

4. In ORD-211 the attorney general held that all information contained in the audit working papers of the auditor of the Texas Commission on Jail Standards and of the attorney general's Organized Crime Task Force that was not specified as excepted was public information.[40]

5. In a letter to the attorney general, Governor Briscoe requested an opinion on whether a letter of recommendation concerning a potential gubernatorial appointment is per se excepted from required public disclo-

30. TEX. REV. CIV. STAT. ANN. art. 342—210 (Vernon 1973).
31. 575 S.W.2d at 511.
32. TEX. ATT'Y GEN. ORD-147 (1976).
33. TEX. ATT'Y GEN. ORD-208 (1978).
34. *Id.* at 2.
35. TEX. ATT'Y GEN. ORD-209 (1978).
36. *Id.* at 2.
37. *Id.*
38. TEX. ATT'Y GEN. ORD-210 (1978).
39. *Id.* at 2.
40. TEX. ATT'Y GEN. ORD-211 (1978).

sure. In ORD-212 the attorney general held that it was not.[41] In particular instances, however, when a factual showing of significant potential infringement of first amendment rights of association and belief is made, such recommendations might be excepted by a constitutional right of privacy.[42] Information contained in a particular letter would not be excepted under a common law right of privacy, unless it was highly intimate or embarrassing and would be highly objectionable to a reasonable person, and the information was not of legitimate concern to the public.[43] The attorney general stated that specific letters of recommendation for an appointment thought to be excepted from disclosure should be submitted to the attorney general for an in camera inspection and determination of whether and to what extent the information may be withheld.[44]

6. In ORD-213 the attorney general determined that the portions of the operational audit of the Humanities Research Center of the University of Texas at Austin that are labeled and contain "recommendations" are excepted from disclosure.[45] In addition, the attorney general stated that the remainder of the audit should be disclosed.[46]

7. In ORD-215 the attorney general held that a deceased individual has no right of privacy.[47] Therefore, a licensing file retained by the Texas State Board of Medical Examiners is not excepted from disclosure when the individual who is the subject of the file is deceased.[48]

8. The attorney general consolidated three requests for opinions concerning whether a closed investigative report is public under the Open Records Act. The response to these requests, ORD-216, held that a report of an explosion and fire was excepted from disclosure to the extent that the information concerned inquiries and responses about the criminal history record of the deceased victim.[49] In all other respects the information was said to be public.[50] In addition, a city fire marshall's report of an investigation of a fire accident that injured a spectator at a football game was held to be public.[51] Finally, the report of an investigation by a Texas Ranger into allegations of sexual misconduct between employees and students at the Gibbons State School was held excepted from disclosure, because it would disclose law enforcement information obtained under a promise of confidentiality.[52]

9. Touche Ross & Company submitted a proposal to conduct an audit of the Criminal Justice Division of the Governor's Office. In ORD-217 the

41. TEX. ATT'Y GEN. ORD-212 (1978).
42. *Id.* at 4.
43. *Id.*
44. *Id.*
45. TEX. ATT'Y GEN. ORD-213 (1978).
46. *Id.* at 2-3.
47. TEX. ATT'Y GEN. ORD-215 (1978). *See also* TEX. ATT'Y GEN. OP. NO. H-917 (1976).
48. TEX. ATT'Y GEN. ORD-215 (1978).
49. TEX. ATT'Y GEN. ORD-216 (1978).
50. *Id.* at 5.
51. *Id.*
52. *Id.*

attorney general held that the preliminary work program for the audit was excepted from public disclosure as a trade secret pursuant to exception 3(a)(10) of the Open Records Act.[53]

10. Price Waterhouse & Company conducted a special audit of the Dallas Independent School District concerning the procedures for purchasing certain materials. In ORD-219 the attorney general held that the majority of the audit report was public, but that two pages entitled "Recommendations to Improve Procedures Surrounding the Solicitation of Bids and Award of Contracts" were excepted from disclosure as an intra-agency memorandum making policy recommendations.[54]

11. In ORD-220 the attorney general held that the records of a bank account, alleged to be a private account of an individual but opened in the name of a city, are not excepted from disclosure.[55] The attorney general stated that there was a substantial public interest and legitimate concern with the information that outweighed any privacy interest in the information.[56]

12. In ORD-221 the attorney general held that the minutes of the Pasadena Independent School Board from 1950 until the present were not excepted from public disclosure.[57] A claim that the records were exempt from disclosure because the minutes in part related to litigation in which a governmental body was, or may be, involved was insufficient to suppress the records.[58]

13. In ORD-222 the attorney general ruled that most of a report of a private consulting firm's study of possible site locations for a sludgetreatment plant was public.[59] The attorney general excepted from disclosure only one page entitled "Recommendation," which was found to be excepted pursuant to section 3(a)(11).[60]

14. In ORD-223 the attorney general decided that the names of applicants for the position of school superintendent were "not required to be revealed where the applicant is able to demonstrate that release of his name is likely to have an adverse effect on his current employment."[61] The attorney general required the district to make such a determination and stated that if an adverse effect on current employment was shown, the names need not be revealed.[62] The attorney general held that such information concerning an identifiable individual's application for employment is excepted as being "information in personnel files."[63]

15. The University of Texas requested an opinion of the attorney gen-

53. TEX. ATT'Y GEN. ORD-217 (1978).
54. TEX. ATT'Y GEN. ORD-219 (1978).
55. TEX. ATT'Y GEN. ORD-220 (1978).
56. *Id.* at 2.
57. TEX. ATT'Y GEN. ORD-221 (1979).
58. *Id.*
59. TEX. ATT'Y GEN. ORD-222 (1979).
60. *Id.* at 3.
61. TEX. ATT'Y GEN. ORD-223 (1979).
62. *Id.* at 3.
63. *See* TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(2) (Vernon Supp. 1980).

eral, seeking to determine whether handwritten student evaluations of faculty members are public under the Open Records Act. In ORD-224 the attorney general held that the evaluations were excepted from required public disclosure.[64]

16. In ORD-225 the attorney general determined that the handwritten notes of a meeting made by the secretary of a governmental body were public under the Open Records Act and that typewritten minutes were public prior to approval by the governmental body.[65]

17. In ORD-226 the attorney general indicated that monthly and annual financial statements and all other documents reflecting income and expenses submitted to Ecktor County by the lessee operator of the county airport were not excepted from public disclosure.[66]

II. ELECTION LAW

A. *Constitutional Attacks*

Texas Election Code. In *Beck v. Texas*[67] a broad constitutional attack was launched upon the Political Funds Reporting and Disclosure Act.[68] The petitioner was convicted of failing to comply with the reporting requirements of the Act and was sentenced to thirty days in jail and a $1,000 fine. The court of criminal appeals upheld the constitutionality of the Act, holding that it (1) was not void for vagueness, (2) did not violate freedom of speech, association, or associational privacy, (3) did not deny petitioner equal protection of the law, and (4) did not violate the state constitutional requirement that subjects embraced in the Act must be expressed in the title.[69]

Another attempt to test the constitutionality of the Election Code, articles 9.09 through 9.12, failed in *Vela v. Texas*.[70] The court of criminal appeals held that constitutional defenses must be pleaded or presented to the trial court. Failure to do so precludes them from being raised for the first time on appeal.

City Charters. In a case involving a constitutional challenge to a city charter a writ of mandamus was granted by the trial court and affirmed on appeal requiring the secretary of the city of Denton to accept a recall petition. The Fort Worth court of civil appeals held that the recall petition should be accepted and also ruled that the Denton Charter as applied by the city secretary was unconstitutional under article 6, section 1 of the Texas Constitution.[71] The secretary refused to accept an amended recall

64. TEX. ATT'Y GEN. ORD-224 (1979).
65. TEX. ATT'Y GEN. ORD-225 (1979).
66. TEX. ATT'Y GEN. ORD-226 (1979).
67. 583 S.W.2d 338 (Tex. Crim. App. 1979).
68. TEX. ELEC. CODE ANN. § 14.07 (Vernon 1967).
69. 583 S.W.2d at 343-46.
70. 572 S.W.2d 128 (Tex. Civ. App.—Corpus Christi 1978, no writ).
71. Holt v. Trantham, 575 S.W.2d 83 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

petition, which was modified only to add the affidavits of petition circulators, because it failed to state new grounds for recall. The court was careful to limit its finding of a constitutional violation to the facts of the case and thus did not find the provision defective on its face.

B. *Construction of the Election Code*

The right of a candidate to have his name printed on the official ballot as an independent candidate is governed by article 13.50 of the Election Code. The San Antonio court of civil appeals held in *Tyler v. Cook*[72] that the signatures on the independent candidates' petitions could be obtained prior to the primary election. The Texas Supreme Court, in effect, reversed that ruling two days later, holding that the provisions of article 13.50 require that the petitions be signed only after the primary election.[73] This, the court held, was the plain intent of the legislature, which in subsection four of the statute provided: "[n]o person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election."[74]

The court found it unnecessary to decide whether the address provision of article 13.50 was met. The lower court had ruled that in a rural county a description of the signers' addresses by box number, post office box, or general delivery was sufficient. The Act merely requires that, "[i]n addition to the person's signature, the application shall show each signer's address, the number of his voter registration certificate, and the date of signing."[75]

In *Vela v. Texas*[76] the Corpus Christi court of civil appeals considered whether the bonding exception of article 9.09[77] applies to municipal elections. The court held that the provisions of articles 9.09 through 9.12 apply to municipal elections and that only exceptions expressly provided in the statute were applicable. *Vela* involved an appeal from a contest of the mayoral election in the city of Hidalgo and a quo warranto proceeding. The incumbent, Eduardo Vela, was declared the winner by a one-vote margin over Enedina Garza, who filed an election contest in the district court of Hidalgo County. Vela, as contestee, did not file a bond under article 9.09 within twenty days of notice of the contest. As provided in article 9.10, however, Garza did file a bond. The Governor thereafter issued a commission appointing Garza to the office of mayor. Vela refused to relinquish his office of mayor and, therefore, Garza and the district attorney filed the quo warranto action to remove Vela from office. This proceeding and the election contest were consolidated for trial. The trial court found that the election was void because it was impossible to ascertain the

72. 573 S.W.2d 567 (Tex. Civ. App.—San Antonio), *rev'd*, 576 S.W.2d 769 (Tex. 1978).
73. 576 S.W.2d at 770.
74. TEX. ELEC. CODE ANN. art. 13.50, § 4 (Vernon Supp. 1980).
75. *Id.* § 5.
76. 572 S.W.2d 128 (Tex. Civ. App.—Corpus Christi 1978, no writ).
77. TEX. ELEC. CODE ANN. art. 9.09 (Vernon 1967).

true results and that Garza was entitled to hold the office of mayor until a new election was held.

The Election Code provides that the contestee may file a bond within twenty days after service of notice of the contest upon him[78] and that, if he fails to do so, the contestant shall have the right, within ten days, to file a like bond payable to the contestee.[79] If the contestant does file the bond, then the clerk shall notify the Governor[80] and, upon receipt of the notification from the clerk, the Governor shall issue a commission to the contestant for the office in controversy pending the election contest.[81] Vela argued on appeal that these provisions were inapplicable to this election, because article 9.06, concerning notice of the contest to the district court, does not refer to municipal elections and because article 8.45 does not give the Governor authority to commission municipal officers. The court of appeals rejected these arguments, holding that only legislative contests were exempt from the bonding requirements,[82] that section 9.06 does not act to exclude municipal elections from consideration by the district courts, and that section 8.45 does not preclude the authority of the Governor to grant commissions to a contestant in a municipal election.[83]

In *Roberts v. Brownsborough Independent School District*[84] a group of taxpayers brought a declaratory judgment action seeking to avoid an order passed by the school district calling for a school bond election. The challenge to the election was based on the district's failure to comply with the Texas Open Meetings Act. The trial court found that, although couched in terms of a declaratory judgment action, the suit was in substance an attack on the validity of the bond election and as such amounted to an election contest. The court found that the plaintiffs failed to give notice of their intention to contest the election within the thirty-day period prescribed by article 9.03 and, therefore, it had no jurisdiction to determine the election contest.

The Tyler court affirmed, interpreting the Election Code to mean that the term "election contest" includes any type of suit concerning the validity of an election or the elective process.[85] The court went on to find that the giving of thirty days' notice is a mandatory prerequisite to an election contest. The Tyler court of civil appeals thus agreed that there was no jurisdiction to consider the suit and that the question under the Open Meetings Act could not be reached.

In *Frias v. Board of Trustees*[86] the El Paso court of civil appeals upheld the right of a corporation to donate money to promote passage of a school bond issue. The contestants of the school bond election argued that a po-

78. *Id.*
79. *Id.* art. 9.10.
80. *Id.* art. 9.11.
81. *Id.* art. 9.12.
82. 572 S.W.2d at 130.
83. *Id.* at 132.
84. 575 S.W.2d 371 (Tex. Civ. App.—Tyler 1978, writ dism'd).
85. *Id.* at 374.
86. 584 S.W.2d 944 (Tex. Civ. App.—El Paso 1979, no writ).

litical committee had received contributions from several corporations, thus violating article 14.06 of the Texas Election Code.[87] Without expressly finding such a violation, the court held that if article 14.06 were construed to prohibit such contributions, then the law would be unconstitutional.[88] It relied upon the United States Supreme Court's ruling in *First National Bank v. Bellotti*[89] and an opinion of the Texas attorney general.[90]

Villarreal v. Hedrick[91] concerned an election contest filed in Kleberg County in which a candidate for county commissioner, who was initially declared the winner but later lost on a recount, filed an action. The Corpus Christi court of civil appeals found that it was not an abuse of discretion for the trial judge to reopen the ballot boxes and recount the ballots in light of the evidence of irregularities.[92] The court noted the broad scope of judicial inquiry in election contests and followed the traditional rule by upholding the trial court's actions in the absence of clear evidence of abuse of discretion.[93]

In *Williamson v. Kempf*[94] the Texarkana court of civil appeals affirmed the issuance of a writ of mandamus issued by the trial court requiring an election judge to certify the results of a school board election. The trial and appellate courts determined that certifying the results of an election is a purely ministerial act under the Texas Election Code and should have been performed notwithstanding that the election judge thought fraud had occurred in the election.[95] The appellate court upheld the issuance of a writ to the board of trustees of the school district requiring them to canvass the returns as provided in section 23.10 of the Texas Education Code.[96] The court held that once the election process has been initiated, it must be concluded, at which time a dissatisfied party can file suit to contest the

87. TEX. REV. CIV. STAT. ANN. art. 1406 (Vernon Supp. 1980).

88. 584 S.W.2d at 948.

89. 435 U.S. 765 (1978) (statute prohibiting corporate contributions in referendum elections held abridgment of first amendment). *See* Note, *Corporations' Right to Free Speech in Referendum Elections: First National Bank v. Bellotti*, 32 SW. L.J. 1359 (1979).

90. TEX. ATT'Y GEN. OP. NO. H-1175 (1978) (article 14.06 corporate contribution prohibition unconstitutional).

91. 579 S.W.2d 41 (Tex. Civ. App.—Corpus Christi 1979, writ dism'd).

92. *Id.* at 45-46.

93. *Id.* The court did not elaborate on what it might consider an abuse of discretion, although it did cite one case that overruled a trial court's election contest judgment due to such abuse. *See* Sewell v. Chambers, 209 S.W.2d 363 (Tex. Civ. App.—Fort Worth 1948, no writ) (where abundant evidence of fraud, trial judge abused discretion in refusing to require recount). Texas appellate courts generally allow trial courts broad discretion in election investigations. Little v. Alto Independent School Dist., 513 S.W.2d 886 (Tex. Civ. App.—Tyler 1974, writ dism'd) (where irregularities would not change outcome of election, trial court did not abuse discretion by ignoring); Vicars v. Stokley, 296 S.W.2d 599 (Tex. Civ. App.—San Antonio 1956), *writ ref'd n.r.e. per curiam*, 300 S.W.2d 623 (Tex. 1957) (not abuse of discretion to allow amendment of pleadings to conform to proof of irregularities found when ballot box opened).

94. 574 S.W.2d 845 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

95. *Id.* at 847.

96. *Id.*

election.[97]

C. *Voting Rights Act*

Although deciding a question of federal law, the recent case of *Heggins v. City of Dallas*[98] is important for its potential impact on city election plans in Texas. In *Heggins* a three-judge panel held that a pending election for the city council of Dallas was covered by the Voting Rights Act of 1965.[99] Over the strong dissent of Judge Robert M. Hill, the court enjoined the city from conducting the elections until it could do so in compliance with the Voting Rights Act. Although the coverage question was decided unanimously, Judge Hill dissented on the question of injunctive relief, observing that such relief was by no means mandatory and should be denied. The majority had determined that an injunction was the "normal remedy" and should be departed from only when the plaintiff brought a suit on the eve of the election.[100] Judge Hill identified three factors that he thought should be considered by courts in deciding whether to grant an injunction. First, a court should consider the potential prejudice to the voting rights of racial minorities.[101] Secondly, the court should consider whether the city has "unduly delayed in seeking approval of changes in its election laws."[102] Thirdly, the court should determine whether the political subdivision has changed its election procedures to evade constitutional review.[103] Judge Hill found that by applying these three criteria to the Dallas election the injunction should not have been granted. Since the date of the *Heggins* decision, the city of Dallas and the Department of Justice have settled upon a compromise plan for electing members to the city council, and the injunction has been dissolved.[104]

III. ZONING

There were a number of decisions[105] during the survey period reaffirming well-established principles of zoning law. Some unusual issues arose, however, in *Southern National Bank v. City of Austin*,[106] in which the Tyler

97. *Id.* at 848.
98. 469 F. Supp. 739 (N.D. Tex. 1979) (three-judge court).
99. 42 U.S.C. § 1973c (1976).
100. 469 F. Supp. at 742-43.
101. *Id.* at 746.
102. *Id.*
103. *Id.* at 747.
104. Heggins v. City of Dallas, No. CA3-79-0118-E (N.D. Tex. Nov. 27, 1979) (order dissolving three-judge court and injunction).
105. *See, e.g.*, Board of Adjustment v. Nelson, 584 S.W.2d 701 (Tex. 1979) (per curiam) (manufacturing activities of sign company ceased, thus property owner abandoned nonconforming use of property that had been annexed and zoned residential); Conway v. Hospital Corp. of Am., 577 S.W.2d 534 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) (ordinance changing zoning classification from single family residential and agricultural to hospital not unreasonable); Currey v. Kimple, 577 S.W.2d 508 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (tennis court held to be within primary use of property as residential dwelling). For an interesting discussion of conditional zoning, see Note, *Conditional Zoning in Texas*, 57 TEXAS L. REV. 829 (1979).
106. 582 S.W.2d 229 (Tex. Civ. App.—Tyler 1979, no writ).

court of civil appeals struck down as unconstitutional a city code provision dealing with the procedure for obtaining building permits, removal permits, and demolition permits, and for altering the exterior of a building during the pendency of consideration of that building as an historic landmark. The specific code provision called into question was the historical preservation ordinance of the city of Austin.

In 1974, the city of Austin added a new article to the city code entitled Historic Landmark Preservation and created a commission known as the Historic Landmark Commission. Pursuant to its authority under the code, the Landmark Commission sought to have the southern portion of the famous Driskill Hotel zoned as commercial-historic. The City Council enacted a zoning ordinance relating to the southern portion of the hotel and thus triggered certain city code provisions dealing with preservation and upkeep of historical landmarks.

The trial court, in a proceeding brought by the owners of the hotel, held that the ordinance that applied to zone the older section of the Driskill Hotel as an historical landmark was unlawful as it violated the United States and Texas Constitutions. No appeal was taken from that action of the trial court. The trial court, however, also denied all other requests for declaratory relief, including a prayer that the court permanently enjoin the city from enforcing the Historic Landmark Preservation Code provisions. Thus, the Tyler court of appeals was faced with a constitutional challenge of the entire statutory scheme. The court held that the section dealing with procedures for obtaining building permits, removal permits, demolition permits, and for altering the exterior of a building or structure during pendency of consideration of the building or structure as an historic landmark or as a part of an historic landmark was constitutionally defective. The code allowed the Landmark Commission to recommend to the city council that property be designated as an historic landmark. Once property was placed on the commission's agenda, it would become subject to restrictions on modification, removal, or demolition for up to sixty days. If the property was recommended by the commission, it could be "frozen" indefinitely until the city council made its decision. The court found that this scheme acted to deprive property owners "of their property without due process as well as depriving them of the equal protection of the laws, because it fails to provide a reasonable time limit on final City Council action after a parcel of property has been listed on the agenda of the Landmark Commission."[107] The court found that the section was defective in that it provided no standards to guide the persons authorized to place the section's restrictions on landowners merely by listing the landowners' property on the commission's agenda. The court further specifically invalidated the provision as it applied to the plaintiff's property.

107. *Id.* at 239.

IV. POLICE POWER

The ability of Texas cities to regulate a wide variety of activities was challenged during the survey period.[108] *Dubuisson v. Texas*[109] involved the attempt of the city of San Antonio to regulate establishments where striptease is performed. A city ordinance prohibited an entertainer or a performer employed in an establishment in which food or beverage is sold and where a striptease act is conducted from mingling with any patron or spectator for any purpose. In addition, the ordinance declared it unlawful for an employee of such an establishment to solicit a patron to purchase food or beverage either for the one soliciting or for another employee.[110] The Texas Court of Criminal Appeals concluded that "the ordinance must stand or fall solely on the basis of the city's general police power, delegated to it by the State to reasonably regulate activities relating to the health, safety, and welfare of its citizenry."[111] The ordinance drew no support from the twenty-first amendment of the United States Constitution, which grants power to regulate activities in establishments in which intoxicating liquors are sold, because the ordinance was not restricted to such establishments.[112]

The court found that the ordinance significantly impinged upon the speech and associational rights guaranteed by the first amendment to the United States Constitution. Where such interests are at stake, the court held, a compelling state interest must be present to overcome the interests guaranteed by the first amendment. The court decided that the interest sought to be protected, while laudable, was not compelling. It was, however, at pains to note that the ordinance was loosely drawn and that a more precise, clear, and narrow ordinance might pass constitutional muster.

In *John v. Texas*[113] the validity of an Arlington city code provision regulating sales on the grounds of municipally-owned property was tested. The Texas Court of Criminal Appeals restated the rule that a city's police powers extend to the reasonable protection of the public health, safety, and welfare. It went on to hold that the city had a legitimate interest in regulating traffic upon city-owned property and that this interest could be fur-

108. *See, e.g.*, City of El Paso v. Public Util. Comm'n, 584 S.W.2d 545 (Tex. Civ. App.—Austin 1979, no writ) (cities have no inherent power to regulate rates of public utilities); Southwestern Pub. Serv. Co. v. Public Util. Comm'n, 578 S.W.2d 507 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (municipalities may grant franchises to utilities to use public streets and alleys but such franchises do not grant the right to engage in sale of electricity to the public).

109. 572 S.W.2d 694 (Tex. Crim. App. 1979).

110. The express purpose of the act was to protect patrons of San Antonio nightclubs from being victimized by employees of these establishments. *Id.* at 697-98, 697 n.5.

111. *Id.* at 697.

112. The court quoted California v. La Rue, 409 U.S. 109 (1972), in which the Supreme Court indicated that the twenty-first amendment created a power broader than the normal state authority over public morals to regulate establishments licensed to sell alcoholic liquors. 572 S.W.2d at 697. The overbreadth of the ordinance in constraining first amendment protected speech may have rendered the provision constitutionally unenforceable even with twenty-first amendment support.

113. 577 S.W.2d 483 (Tex. Crim. App. 1979).

thered by enacting an ordinance prohibiting the sale of goods or services on such property. Thus, the court ruled that the ordinance was a proper exercise of the police power delegated to the city by the Texas Constitution. The appellant, John, also attacked the ordinance on constitutional equal protection grounds, because it contained an exception for persons who had contracted with the city to engage in sales on city property. The court noted that the class so established was not unreasonable or arbitrary considering the city's legitimate aim in regulating the number of vendors in areas where large crowds congregate.[114]

In *Jones v. Odessa*[115] the El Paso court of civil appeals found that the Odessa City Charter, which gave the city council power to "establish all necessary rules and regulations protecting the health" of the residents of the city and also "to define all nuisances and prohibit the same within the City," supported the enactment of an ordinance for the destruction of buildings that are a "fire hazard," or "dangerous to human life."[116] In *Utter v. Texas*[117] the court of criminal appeals upheld a city ordinance requiring a permit for the operation of a wrecker in the city in the face of alleged unconstitutionality because of a conflict with state statutory provisions regulating the wrecker industry. The court found no such conflict and therefore upheld the constitutionality of the ordinance.[118] It also rejected the argument that the license fee collected pursuant to the ordinance was an occupational tax prohibited by state law.[119] The court, applying the usual test of determining whether the ordinance was principally for the raising of revenue or whether its primary purpose was to regulate, found that it was a purely regulatory ordinance.[120]

V. INCORPORATION

Durham v. Crutchfield[121] involved a suit brought by private parties attacking the validity of the incorporation of the town of Sun Valley. The Texarkana court of civil appeals held that a quo warranto proceeding brought by the state is the only method of making a direct attack upon a voidable municipal corporation; private parties lack standing to attack directly the existence and organization of a municipal corporation.[122] The court went on to say, however, that private citizens may attack a void incorporation in certain instances, such as where the act of incorporation itself is either prohibited or unauthorized by law.[123] In *Durham* the plaintiffs were unable to demonstrate that the incorporation was void or that

114. *Id.* at 485-86. The court observed that the appellant had never attempted to join the class himself by contracting with the city. *Id.* at 485 n.1.
115. 574 S.W.2d 850 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
116. *Id.* at 853.
117. 571 S.W.2d 934 (Tex. Crim. App. 1978).
118. *Id.* at 936.
119. TEX. REV. CIV. STAT. ANN. art. 6698 (Vernon 1977).
120. 571 S.W.2d at 937.
121. 578 S.W.2d 438 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).
122. *Id.* at 440.
123. *Id.* at 441.

they suffered direct injury as the result of a voidable incorporation. As the State of Texas was not a party to the lawsuit and because private citizens cannot compel the state to become a party to their suit or to file a quo warranto proceeding in their behalf, the court held that there was no jurisdiction, the case was dismissed, and the trial court judgment was affirmed.[124]

VI. ANNEXATION AND DISANNEXATION

A. *Annexation*

The Supreme Court of Texas decided only one annexation case during the survey period. In *State ex rel. McWilliams v. Town of Oak Point*[125] the supreme court affirmed the Fort Worth court of civil appeals holding that an inhabitant of a territory sought to be annexed under the provisions of article 974[126] must be a "registered voter" in order to vote in an annexation election. The statute does not expressly mention registration, but the court interpreted the requirement that annexation voters be "qualified to vote for members of the State Legislature" to mean that such voters must be registered and not merely eligible to register.[127]

In *Sabine Offshore Service Co. v. City of Port Arthur*[128] the Beaumont court of civil appeals decided whether a city annexing territory must assume responsibility for providing water to all the users within the annexed territory, including businesses selling large amounts of water to offshore drillers. The court held that when the city of Port Arthur annexed the Sabine Pass area it assumed the responsibility of providing water to all users, but only if the demand for such water was reasonable and within the capacity of Port Arthur. The court held the municipality could refuse to supply water in the amount requested provided its decision was not discriminatory. As the court found no discrimination against Sabine Offshore Service, it affirmed the judgment for the city.

The extent and effect of articles 1183 through 1187,[129] which allow cities on navigable streams to extend their city limits within certain boundaries for the limited purposes of aiding navigation and wharves, was called into question in *City of Nassau Bay v. Winograd*.[130] Pursuant to an annexation of property, the city of Nassau Bay brought into its jurisdiction a navigable stream known as Cow Bayou or Carlton Lagoon. Dr. Winograd had property adjacent to the lagoon. The controversy arose when Nassau Bay began to require that Winograd comply with all of its general regulatory

124. *Id.* at 442.
125. 579 S.W.2d 460 (Tex. 1979).
126. Article 974 provides in part that "a majority of the inhabitants qualified to vote for members of the State legislature of any territory adjoining the limits of any city incorporated under, or accepting the provisions of, this title" may vote for annexation of the territory to the city. TEX. REV. CIV. STAT. ANN. art. 974 (Vernon 1963).
127. 579 S.W.2d at 463.
128. 582 S.W.2d 477 (Tex. Civ. App.—Beaumont 1979, no writ).
129. TEX. REV. CIV. STAT. ANN. arts. 1183-1187 (Vernon 1963).
130. 582 S.W.2d 505 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

ordinances. Nassau Bay contended that its right of general regulatory control over Winograd was conferred by article 1186.[131] Winograd argued that articles 1183 through 1187 were for the more limited purpose of annexation to promote and regulate navigation and wharfage and did not require him to comply with the general regulatory control of the city. The court of appeals recognized the limited scope of the statutes and held that the city's annexation of Winograd's land did not give it general regulatory control over that land.

In *City of Missouri City v. Senior*[132] the Houston (1st District) court of civil appeals upheld the right of private parties to attack collaterally an annexation ordinance if the parties are directly affected by the ordinance and it is void ab initio. The court also considered the legislature's well-recognized power to validate an act of annexation that does not meet with traditional requirements of the Municipal Annexation Act.[133] It ruled, however, that the legislature must evidence a clear intention to validate an ordinance that fails to comply with the Act.[134] The appellate court affirmed the trial court's voiding of two Missouri City annexation ordinances, finding that the purported annexation had not been in compliance with state statutes[135] and that the dispute was subsequent to validating state legislation.[136]

In *City of Houston v. Moody*[137] a water control district was annexed by the city of Houston. Creditors of the water control district brought suit against the city on certain debts incurred prior to annexation and were awarded a judgment in the lower court but were denied attorneys' fees. The court of civil appeals affirmed the trial court's holding that the city had an equitable obligation to make restitution.[138] The appellate court also upheld the denial of attorneys' fees.[139]

In *City of Forney v. Estate of J. W. Pinson*[140] certain landowners sought to have four 1960 annexation ordinances declared invalid. The trial court declared the ordinances unconstitutional, and the Texarkana court of civil appeals affirmed. Although stipulating that portions of the four ordinances were unconstitutional, the city of Forney urged that the illegal portions of the ordinance should be severed from the remaining portions, thus

131. Article 1186 provides that after passage of an annexation ordinance, the city "shall have and exercise the fullest and most complete power of regulation of navigation and of wharfage . . . and shall further have authority by criminal ordinances or otherwise, to police the navigation of said waters and the use of said wharves . . . ." TEX. REV. CIV. STAT. ANN. art. 1186 (Vernon 1963).

132. 583 S.W.2d 444 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

133. TEX. REV. CIV. STAT. ANN. art. 970a (Vernon 1963 & Pam. Supp. 1963-1979).

134. 583 S.W.2d at 448.

135. The annexation ordinance contained an incorrect description of the annexed lands and was thus void ab initio. *Id.* at 447-48.

136. The court ruled that the validating statutes raised by the city were either inapplicable, TEX. REV. CIV. STAT. ANN. arts. 974d—19, —21, —22 (Vernon Pam. Supp. 1963-1979), or effective prior to the date the dispute arose, *id.* arts. 974d—12, —13. 583 S.W.2d at 448.

137. 572 S.W.2d 13 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

138. *Id.* at 16-17.

139. *Id.* at 17.

140. 575 S.W.2d 58 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

permitting the annexation to stand. The court held that such a severance was not possible, because after the invalid parts had been severed there was not a valid ordinance capable of being enforced and of effecting the purpose and intent of the city council.[141] Finally, the court held that an unconstitutional ordinance that is not questioned between 1960 and 1976, when the present suit was brought, is not susceptible to a defense of limitations. The court ruled that "no constitutional ordinance can become valid simply by going unquestioned for more than four years."[142]

B. *Disannexation*

In *City of Hitchcock v. Longmire*[143] the Houston (1st District) court of civil appeals considered whether citizens of a homerule city could repeal an annexation ordinance by referendum. The court observed that the repeal of an annexation ordinance by referendum would operate as a disannexation and should be governed by the rules for disannexation defined in articles 970a[144] and 1175(2).[145] Pursuant to article 970a and to the city charter, only a majority of the qualified voters of the annexed area may initiate the disannexation procedure; thus, a popular referendum of the city's voters would be ineffective to repeal the ordinance.[146]

A similar result was reached in *Vara v. City of Houston*,[147] in which the Houston (14th District) court of civil appeals determined that the disannexation procedure has been withdrawn by the legislature from the initiatory process and that the parties seeking the disannexation had failed to comply with either article 970a, the Municipal Annexation Act,[148] or article 1266, allowing disannexation of unimproved territory of minimum acreage contiguous to the city boundary.[149] Accordingly, the court ruled that a writ of mandamus to compel a referendum was properly denied.[150]

---

141. *Id.* at 61.
142. *Id.*
143. 572 S.W.2d 112 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).
144. TEX. REV. CIV. STAT. ANN. art. 970a (Vernon 1963 & Pam. Supp. 1963-1979).
145. *Id.* art. 1175(2) (annexation and disannexation procedures may be established in the city charter so long as consistent with article 970a).
146. 572 S.W.2d at 127.
147. 583 S.W.2d 935 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).
148. TEX. REV. CIV. STAT. ANN. art. 970a (Vernon 1963 & Pam. Supp. 1963-1979).
149. TEX. REV. CIV. STAT. ANN. art. 1266 (Vernon 1963). The court appears to ignore the second prong of this provision that allows the discontinuance of improved territory in cities with a population of 596,000 or more. 583 S.W.2d at 938.
150. 583 S.W.2d at 939.